Book Reviews

Community Care and the Law by Luke Clements (3rd edition)

Published by Legal Action Group (2004) £37.00

“Community care law remains a hotchpotch of conflicting statutes, which have been

enacted over 50 years; each statute reflects the different philosophical attitudes of the

time”

So concludes Luke Clements in the Introduction to the third edition of *Community Care and the*

*Law*, which to the relief of community care practitioners has just been published. In other words

the law in this field is in a mess and cries out for reform in the way that the law relating to children

was reformed by the *Children Act 1989*. Sadly, as the author observes there appears to be little sign

that this will occur. All this is well known to practitioners and presents a considerable challenge to

anyone who seeks to encompass the relevant law in a way that is useful both to the experienced

lawyer as well as the non-lawyer who needs to be able to understand its essentials. On both counts

Luke Clements succeeds in a way that is masterly.

One of the keys to the author’s success is to know what to leave out. As he asks at the beginning:

“How can you do justice to the subject and yet exclude detailed consideration of welfare benefits

or special education?” He does however do this and for very good reason (the ever changing nature

of the former and the availability of alternative sources of information), and he focuses on the

central community care statutes listed in the *National Health Service and Community Care Act 1990*

– a substantial component of which remains the *National Assistance Act 1948*, a key aspect of the

package of legislation that ushered in the welfare state. As a consequence the third edition

resolutely maintains the focus of its predecessors on that mishmash of statutes, regulations,

directions and guidance that make up the law relating to the provision of community care services

and which, at first sight and probably at second sight as well, seems to the uninitiated, terrifyingly

complex.

The other key to successfully addressing this topic is to set its development firmly within its

historical context. In his Introduction Luke Clements in 8 pages sets out a most succinct summary

of the relevant history from the great post-war reforms of 1948 through to the *Health and Social*

*Care Act 2001*, acknowledging on the way the emergence in the 1990s of the disability rights

movement, and observing that over the last ten years there has been a marked absence of any

radical new thinking by the Government in philosophical or legal terms. The focus has been on

structural and administrative reform and he quotes with approval Onora O’Neill’s observation in

the 2002 Reith Lecture that “central planning may have failed in the Soviet Union but it is alive

and well in Britain today”

Having set the scene, the author then proceeds to approach (attack is possibly a better word) the

subject in such a way as to disentangle its complexity and persuade even the most timorous reader

that it is possible, at the very least, to grasp the essentials of this demanding and at times rather

rambling subject. At the outset it is essential to acquire some understanding of the legal basis of

the functions of social services authorities and the regulatory framework in which they are

undertaken. Some comprehension of the obligatory and discretionary functions of social services

authorities (the distinction between which is not always as clear as it may seem), “target” and

“specific” statutory duties and the relationship between regulations, directions and guidance are

important if the reader is to make headway, and in the first chapter Luke Clements addresses these

issues in a clear and comprehensive manner. It is followed by a discussion of the strategic context

with an exploration of the obligations of both social services and the NHS to plan strategically,

increasingly in collaboration with each other. He then moves to identify the potential beneficiaries

of all this effort, and deals with the obligations of local authorities and health bodies to provide

disabled people with relevant information, as well as data protection and confidentiality issues.

Having disposed of a number of key contextual issues, the author turns in the next three chapters

to address what many would regard as the heart of the subject: the duty of social services to assess

need, the provision of services and the care plan, and the important ancillary topic of the meaning

of ‘ordinary residence’ (a reminder of the persistent survival of a number of Poor Law concepts

in the current law). Assessment and care planning are as Luke Clements reminds us, central to the

social work process and seek to reconcile the demand for services with the resources available.

He quotes Phyllida Parsloe’s comments of over ten years ago that “the NHS and Community Care

Act backs a whole field of horses, with the two front runners being user choice and scarce

resources. Local authorities are apparently expected to give equal weight to empowering users and

keeping within their own budget”.[[1]](#footnote-1)

Eligibility for assessment, the nature of an assessment, the assessment process itself, what needs

must be satisfied by the provision of services, the issue of resources and the limits of the eligibility

criteria (in particular the key case of *R v Gloucestershire CC ex p Barry[[2]](#footnote-2)*), and timescales for

assessments are amongst the issues dealt with in the assessment chapter with the assistance of

helpful explanatory diagrams. A similar logical approach is taken to the provision of services and

care planning with a particularly helpful diagram addressing common service problems.

Care home accommodation and domiciliary and community-based services are the subjects of the

next two chapters. Particularly helpful are the discussion about the legal implications of home

closures (especially the Coughlan[[3]](#footnote-3) case) and the author’s attempt to present diagrammatically the

ludicrously complicated legal basis for the provision of domiciliary and community based services.

An example of the author’s attention to detail as well as the practical value of this book for

non-lawyers working in the field, is the section on manual handling – relevant not only in care homes

but increasingly in domiciliary and community settings.

An alternative way in which local authorities can discharge their community care responsibilities is

by way of direct payments. It is probably fair to observe that this particular alternative is where the

aims and objectives of the disability rights movement and community care provision appear to be

least in collision and the legal framework within which they are administered is presented in a

separate chapter.

Social services authorities and their responsibilities are the principal focus of the first nine chapters.

One of the reasons for the complexity of the subject is that as Luke Clements notes: “At no time

since the formation of the NHS has there been a clear separation between its responsibilities for

health services and those of the local authorities for care services.” In a chapter entitled NHS

responsibilities for community care services, Luke Clements places those responsibilities in a

concise historical context and then addresses a number of crucial issues. These include the NHS’s

continuing health care responsibilities, the scope of which has been exercising the service since at

least 1957 and the publication of the Bouchier Report which addressed the worries of local

authorities that their residential homes were caring for many people who ought to be in hospital.

More recently this problem has been the subject of high profile publicity commencing with the

publication of a highly critical Health Service Commissioners report in 1994, the Coughlan case, no

less than three separate sets of guidance, and finally ‘*The Continuing Care (National Health Service*

*Responsibilities) Directions 2004’*. That it has taken so long to begin to resolve this issue is an

indicator in itself of the wider challenges faced by those seeking to work with the law in this area.

Twenty years ago it is probably correct to note that the law made no provision for the needs of

carers in the community. In that time three separate piece of legislation have been enacted that give

increased recognition and rights to Britain’s 6 million carers, including young carers. One again a

consequence of the incremental development of the relevant statutory provision is that the

resulting legal framework is in places mind numbingly complex, and the author’s diagrammatical

representation of the rights of carers is a great assistance in fully understanding the implications

of the chapter on carers. Similarly complex are the arrangements for charging for community care

services; an issue highlighted in 2002 for mental health services by the decision of the House of

Lords in *R v Manchester CC ex p Stennett and others[[4]](#footnote-4)* that it is unlawful for local authorities to

charge for services under section 117 of the Mental Health Act 1983. Charging by social services for

community services falls under two headings: the general duty to charge for accommodation in

registered care homes and the discretionary power to charge for non-accommodation services. In

relation to the latter, one of the challenges is that there is no statutorily defined procedure for

assessing non-accommodation charges. It is no use pretending that the home care charging rules are

very easy to comprehend but the presentation in the text of a tabular example goes a long way to

providing some enlightenment.

The next five chapters deal with specific groups of community care service users: people with a

learning disability; older people; mental health service users; users of drug, alcohol and HIV/AIDS

services; tenants and owner occupiers in receipt of housing-related community care services, and

finally children. The chapter on mental health service users helpfully links The National Service

Framework standards, in particular Standards 2, 3 and 4, with the Care Programme Approach and

entitlements to community care assessments under the *National Health Service and Community*

*Care Act 1990*, and considers the decision in *R (on the application of HP and KP)* *v London Borough*

*of Islington*[[5]](#footnote-5). It finishes with a comprehensive examination of the implications of section 117 of the

Mental Health Act 1983, and the author’s consideration of the duration of the duty under this

section is especially helpful.

Community Care and the Law concludes with detailed examination of the remedies available in

law by which a failure in the provision of community care services may be challenged: for example,

the various complaints procedures, judicial review, default powers; and an application to the court

under the Human Rights Act 1998. As with the rest of the book the discussion is clear, concise

and accessible to the interested non-lawyer.

Since the publication of the first edition, Community Care and the Law has been an essential tool

for all those who advise on community care entitlements, and the third edition merely confirms

that position. It is well presented with a good index and an extensive range of different tables

including those listing local government ombudsman complaints decisions referred to in the text

and relevant circulars and guidance. In addition a number of helpful precedents are provided.

Whilst it is always possible to identify topics that could usefully be included – for example a little

more on the implications of the *Disability Discrimination Act 1995 and the Race Relations*

*(Amendment) Act 2000* for the public authorities undertaking community care responsibilities

would have been interesting – this third edition more than enhances the reputation established by

its predecessors. It is an essential requirement for anybody seriously interested in this subject.

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1. Community Care, “Making a bid for fair play”, 5 August 1993. [↑](#footnote-ref-1)
2. [1997] 2 All ER 1 [↑](#footnote-ref-2)
3. R v North and East Devon Health Authority ex p Coughlan. [2000] 3 All ER 850. [↑](#footnote-ref-3)
4. (2002) UKHL 34. See ‘Charging for after-care services under section 117 of the Mental Health Act 1983’ by Nicolette Priaulx, JMHL December 2002 pp 313–322. [↑](#footnote-ref-4)
5. [2004] EWHC 7 (Admin). This decision is reviewed by Joanna Sulek in this issue of the JMHL. [↑](#footnote-ref-5)